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No. 99-681

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IN THE

Supreme Court of the United States

BARRY ACKERLEY, WILLIAM ACKERLEY, FULL HOUSE SPORTS & ENTERTAINMENT, INC., and SEATTLE SUPERSONICS, INC.,

Petitioners,

v.

LAURA A. LAMBERT, ESTHER ACKLEY, STEVE BELLING, PAT COOKE, LETITIA SELK, and CHUCK VILTZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Facts 2

B. Procedural History 5

REASONS THE PETITION SHOULD BE DENIED 8

I. THIS CASE DOES NOT PRESENT A CIRCUIT CONFLICT 9

A. The Ninth Circuit's Holding Does Not Conflict With the Second Circuit's Holding in *Genesee Hosptial* 9

B. The Ninth Circuit Properly Construed Section 215(a)(3) 13

C. Petitioners' Proposed Interpretation of Section 215(a)(3) Would Amount to Judicial Repeal of the Statute 16

II. THE EVIDENCE AT TRIAL SUPPORTED THE JURY'S VERDICT THAT BARRY AND WILLIAM ACKERLEY ARE LIABLE 17

III. THE EVIDENCE AT TRIAL SUPPORTED THE JURY'S AND THE DISTRICT COURT'S DETERMINATIONS THAT PLAINTIFFS AS A GROUP ENGAGED IN PROTECTED ACTIVITIES 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES:

BMW v. Gore, 517 U.S. 559 (1996) 7

Booze v. Shawmut Bank,
62 F. Supp. 2d 593 (D. Conn. 1999) 12

Bonnette v. California Health & Welfare Agency,
704 F.2d 1465 (9th Cir. 1983) 18

Brennan v. Maxey's Yamaha,
513 F.2d 179 (8th Cir. 1975) 13

Brock v. Casey Truck Sales,
839 F.2d 872 (2nd Cir. 1988) 11, 13

Brock v. Hamad, 867 F.2d 804 (4th Cir. 1989) 18

Brock v. Richardson, 812 F.2d 121
(3d Cir. 1987) 12, 13

Daniel v. Winn-Dixie Atlanta,
611 F. Supp. 57 (N.D. Ga. 1985) 13

Dole v. Elliott Travel & Tours,
942 F.2d 962 (6th Cir. 1991) 18, 19

Donovan v. Agnew, 712 F.2d at 1509 (1st Cir. 1983) 18

Donovan v. Grim Hotel, 747 F.2d 966 (5th Cir. 1984);
cert. denied, 471 U.S. 1124 (1985) 18

Donovan v. Sabine Irrigation Co., 695 F.2d 190 (5th Cir. 1983), *cert. denied sub nom. Alberding v. Donovan*, 463 U.S. 1207 (1983) 19

Drollinger v. Arizona, 962 F.2d 956 (9th Cir. 1992) 14

EEOC v. Romeo Community Sch., 976 F.2d 985 (6th Cir. 1992) 13

EEOC v. White & Son Enters., 881 F.2d 1006 (11th Cir. 1989) 13

Goldberg v. Whitaker House Co-op., 366 U.S. 28 (1961) 18

Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999) 8, 10, 11

Lambert v. Genesee Hospital, 10 F.3d 46 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994) ..... *passim*

Love v. RE/MAX of Am., 738 F.2d 383 (10th Cir. 1984) 13

Mitchell v. Robert DeMario Jewelry, 361 U.S. 288 (1960) 13, 14

Neder v. United States, 119 S. Ct. 1827 (1999) 24

Saffels v. Rice, 40 F.3d 1546 (8th Cir. 1994) 12

TXO v. Alliance Resources Corp., 509 U.S. 443 (1993) 7

United States Dep't of Labor v. Cole Enter.,
62 F.3d 775 (6th Cir. 1995).....18

Valerio v. Putnam Assoc.,
173 F.3d 35 (1st Cir. 1999).....11

STATUTES AND RULES:

29 U.S.C. § 201-219.....1
§ 203(d).....18
§ 215(a)(3).....1, 2, 9, 11, 12, 13, 14, 16
§ 216(b).....18

Wash. R. Civ. P. 3(a).....15

OTHER:

Webster's New Collegiate Dictionary (1981).....15

STATEMENT OF THE CASE

This is a retaliation case under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Respondents are six former season ticket sales agents for the Seattle Sonics basketball team. Petitioners are the corporate owners of the Sonics and Barry and William Ackerley, the individuals who decided to fire respondents because respondents filed a complaint seeking overtime compensation. The Ackerleys and their companies have a long history of unlawful employment practices, including refusal to pay overtime compensation as required by the FLSA. In an effort to change this unlawful policy, respondents requested an investigation by the Department of Labor, hired counsel, presented a formal written complaint to their employer, served a state court complaint, and negotiated a settlement of claims for overtime compensation.

After settling respondents' claims to avoid litigation, the Ackerleys retaliated against respondents by firing them. Such retaliation is a violation of the Fair Labor Standards Act in every federal circuit in the United States. The anti-retaliation provision of the FLSA, 29 U.S.C. § 215(a)(3), unambiguously prohibits employers from retaliating against employees because they have "filed any complaint or instituted or caused to be instituted any proceeding under the Act." That the employees in this case filed a complaint and instituted proceedings under the Act cannot reasonably be disputed. Affirmance of the jury's verdict in plaintiffs' favor on this issue by the district court and by the Ninth Circuit was a routine application of unambiguous statutory language.

Petitioners ask this Court to grant a writ of certiorari based primarily on the Second Circuit's decision in *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994). In that case, the court held that employees do not engage in protected conduct when they

make an oral complaint about their pay without alleging that their employer is engaging in unlawful conduct. The Second Circuit noted:

> [Plaintiffs] merely complained that it was "not fair" that [plaintiff] did not receive charge-person pay for her duties, without stating that sex was the reason for the disparity.

10 F.3d at 55. Neither the Ninth Circuit nor any other federal court of appeals has held that employees like those in *Genesee Hospital*, who merely complained that their wages were "unfair," are protected by § 215(a)(3). Nor has the Second Circuit suggested that employees who are fired because they open a governmental investigation, serve a lawsuit, and file and settle a formal written complaint with their employer have no FLSA protection from retaliation. There is no conflict in the holdings of the Ninth and Second Circuits.

Petitioners' other arguments present no genuine legal issues at all, but involve only fact-bound challenges to evidentiary sufficiency and jury instructions – arguments that are based on inaccurate characterizations of the evidence and are, in any event, not appropriate grounds for granting a writ of certiorari. The Petition should be denied.

A. Facts

Petitioners present a lengthy and largely irrelevant factual recitation seemingly aimed at suggesting that respondents' complaints of overtime violations and retaliation were factually groundless. In contrast to petitioners' one-sided presentation, the evidence before the trial court demonstrated a long history of overtime violations and a clear case of retaliation. Indeed, it has never been disputed in this case that respondents were employees subject to the FLSA's overtime requirements, nor that

petitioners failed to compensate them for the actual amounts of overtime they worked, as required by law.

On May 16, 1994, at a ticket sales department meeting, respondents complained about not receiving overtime compensation. RT[2/7]:64-65 (SER 183-84). Respondents' immediate supervisor responded that: "Sales is a 24-hour-a-day job. There will be no overtime next year. You don't have to worry about it." RT[2/7]:66 (SER 185). After further discussion of the overtime issue among the respondents, the senior account executive, Laura Lambert, contacted the U.S. Department of Labor and requested information about whether the Sonics' overtime policies complied with the law. RT[2/7]:68-69 (SER 187-88).

On May 20, 1994, the Department of Labor advised Ms. Lambert that the Sonics' scheme violated the overtime laws. RT[2/7]:71-72 (SER 190-91). Ms. Lambert confronted Eddie Roldan, the payroll manager, and Brian Dixon, the vice-president for finance, with this information. Mr. Roldan and Mr. Dixon admitted that the Sonics had been violating the overtime laws; however, Mr. Dixon told Ms. Lambert that "his hands were tied" because "Ackerley will not pay overtime and doesn't care what the laws are." RT[2/7]:73-75 (SER 192-94). Mr. Dixon went on to tell Ms. Lambert that if she pursued the overtime issue:

> [Y]ou will definitely not have a job here, you will be fired. The decision is up to you. Everyone else in the office will love you, but you are jeopardizing your job. Is it worth it to you for a thousand dollars?

RT[2/7]:76-77 (SER 195-96).

Despite these threats, Ms. Lambert hired counsel. The account executives as a group selected Ms. Lambert and Chuck Viltz to represent them in discussions with Sonics management about compensation issues. RT[2/7]:83;

RT[2/9]:379 (SER 202, 265). On behalf of the respondents, Ms. Lambert presented the Sonics' management with a formal written request for overtime compensation. When this request proved unavailing, Ms. Lambert's attorneys served a Washington Superior Court complaint on Barry Ackerley, requesting that *all* of the account executives be paid overtime compensation as required by law. Exh. 53 (ER 117-18). Pending further discussions, the complaint was not filed with the court.

The Sonics then embarked on a course aimed not at complying with the law, but at silencing criticism, avoiding Ms. Lambert's lawsuit, and ridding themselves of employees who insisted on their legal rights. On October 6, 1994, John Dresel, on behalf of the Sonics, settled Ms. Lambert's overtime claims on terms that the Sonics insisted be kept secret. Exh. 1 (SER 70-74). Shortly afterward, Mr. Dresel purported to settle overtime compensation claims with each of the other respondents. Less than a week later, on October 12, 1994, Mr. Dresel prepared a secret memorandum to Bill Ackerley confirming that Mr. Dresel was "planning to layoff the entire ticketing sales staff by November 30." Exh. 2 (ER 113). The evidence showed that overtime complaints were the major management issue during the six days between the settlement with Laura Lambert and the decision to terminate her and the other respondents. Exh. 308 (SER 157); RT[2/20]:823 (SER 353); Exh. 309 (SER 158); Exh. 190 (SER 153-55); RT[2/20]:835-36 (SER 365-66).

On December 2, 1994, the Sonics fired nine of the ten employees in the ticket sales department, including the six respondents. Instruction 8 (Stipulations of Fact) at ¶ 12 (CR 192; SER 14). The Sonics were so bold as to preserve the job of Randy Novak, the one employee in the ticket sales department who had never complained. RT[2/12]:506-509 (SER 271-74). Mr. Novak was temporarily transferred to another department and then, shortly after the so-called

"restructuring" of the ticket sales department, returned to his old position. RT[2/12]:508-09; RT[2/20]:906 (SER 273-74, 427); RT[2/12]:509; RT[2/20]:907 (SER 274, 428).

Also shortly after the "restructuring," the Sonics announced new job openings for ticket sales account executives. Exh. A-202 (SER 161); *see* RT[2/21]:1135-36 (SER 443-44); *see also* Exh. 17 (SER 120-25). These announcements described positions identical to those respondents had previously held.

Although Sonics managers and attorneys continue to this day to follow a public relations script and claim that their action was a "restructuring," the overwhelming evidence at trial showed that the respondents were fired because they complained about the Sonics' unlawful overtime compensation policy. Despite elaborate steps, including alteration of evidence, to cover up Barry and Bill Ackerley's personal involvement in the decision to eliminate complaining employees, the evidence at trial showed that the Ackerleys personally directed the scheme.

B. Procedural History

After the firings, respondents sued in state court, claiming violations of the FLSA's overtime requirements and its anti-retaliation provision. Petitioners removed the case. United States District Judge Barbara Rothstein ruled on summary judgment that the Sonics violated the FLSA by failing to pay overtime compensation as required by the statute (a decision not challenged by the Sonics on appeal), and the case went to trial on the retaliation claims.

On February 29, 1996, the jury unanimously found that each of the plaintiffs was wrongfully terminated in retaliation for complaining of FLSA violations. The jury made a separate finding of liability against each of the defendants. The jury also made a separate finding that each of the defendants acted willfully. The jury made individual

awards of compensatory damages to each of the plaintiffs and imposed punitive damages against each of the defendants. (ER 59)

After trial, petitioners moved for judgment as a matter of law and for remittitur of the punitive damages award. The court denied the motion for judgment as a matter of law. Rejecting petitioners' argument that the FLSA did not protect respondents' activities, the court found:

> [B]ased on the evidence presented by plaintiffs concerning their activities, their acts rise to the level of protected activities under the FLSA. These activities include the following: complaints to managers by plaintiffs concerning defendants' overtime policies; contact with the Department of Labor; complaints to the Vice President of Finance; hiring an attorney to look into the issue; and delivery to Barry Ackerley of a complaint regarding this issue.

Order Denying Defendants' Motion for Judgment as a Matter of Law (ER 69 at ER 73).

The court also rejected as factually inaccurate defendants' claim that certain of the plaintiffs did not engage in sufficient protected conduct to be covered by the statute. The court explained:

> Plaintiff Laura Lambert spearheaded much of the complaining done by plaintiffs, but as John Dresel testified at trial, in his mind "the whole group [was] lumped together" at the time the plaintiffs were fired. In addition to finding that plaintiffs together participated in protected activity, the court finds that the overwhelming evidence at trial was that plaintiffs were treated as a group by

> defendants. The evidence also demonstrated that Lambert's complaints were voiced on behalf of the group of plaintiffs, and that defendants perceived the complaints to be on behalf of the group as a whole. Defendants negotiated with and treated Lambert as a representative and leader of the group of plaintiffs. Plaintiffs' theory of their case was that the entire group of ticket sales agents was terminated because defendants did not want to pay them overtime and the ticket sales staff had begun to complain about this. . . . [B]ased on the evidence presented, the court cannot find that this was an unreasonable conclusion for the jury to draw.

Id. at ER 77.

In addition, the court rejected petitioners' argument that Barry and William Ackerley should not be held personally liable for their misconduct. The court found that "Barry and William Ackerley had 'operational control,' had 'economic control over the relationship' with plaintiffs, . . . and were employers as that term is used in the FLSA." *Id.*

Carefully applying this Court's rulings in *BMW v. Gore*, 517 U.S. 559 (1996), and *TXO v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the court granted defendants' motion for remittitur and reduced the amount of the punitive damage award as to each defendant. As instructed by this Court's decision, the district court assessed the individual responsibility of each defendant and found that:

> Plaintiffs presented substantial evidence, and the jury implicitly found such evidence credible, of the following: defendants knowingly engaged in unlawful acts; defendants had previously been made aware of the requirements of the FLSA; defendants

> proceeded to willfully violate the FLSA; defendants could not reasonably interpret the law to permit retaliatory discharge for assertion of FLSA rights; defendants acted with malice toward plaintiffs; and defendants attempted to conceal their motivation in terminating plaintiffs.

Order Denying Defendants' Motion for Judgment as a Matter of Law (ER 69 at ER 89). Nonetheless, considering the ratio of punitive and compensatory damages and the criminal penalties for such misconduct, the court found that the jury's punitive damages award was excessive and that an appropriate punitive damages award would be twice the amount of lost wages per defendant.

Defendants appealed. The initial decision of a three-judge panel of the Ninth Circuit was vacated, and the Ninth Circuit heard the case *en banc*. *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (*en banc*). The Ninth Circuit affirmed the decision of the district court. The court held that plaintiffs engaged in protected conduct under the FLSA by filing a complaint with their employer, contacting the Department of Labor, and serving and settling a Superior Court lawsuit. The court affirmed the finding of individual liability against Barry and William Ackerley, finding that "[t]he jury heard extensive testimony that both Ackerleys were aware of and participated in the overtime dispute with the plaintiffs here, and were involved in the decision to terminate the sales staff." *Id.* at 1012. The court also affirmed the finding of the jury and the district court that all of the plaintiffs engaged in protected activity.

REASONS THE PETITION SHOULD BE DENIED

Review by this Court is not appropriate. The Ninth Circuit's holding is not inconsistent with the Second Circuit's holding in *Lambert v. Genesee Hospital*, 10 F.3d 46

(2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994). In *Genesee Hospital*, the court held that an employee's informal statement to a supervisor that her compensation was "not fair" was not protected conduct under Section 215(a)(3). Here, respondents complained to the Department of Labor, filed a formal written demand for overtime with their employer, served a lawsuit, and negotiated a formal settlement. This would be protected conduct even under the narrowest conceivable reading of Section 215(a)(3). Petitioners also request that this Court review the evidence supporting the jury's decision on two issues of fact. There was ample evidence at trial supporting the jury's findings, and this Court does not review factual determinations on certiorari. The Petition should be denied.

I.

THIS CASE DOES NOT PRESENT A CIRCUIT CONFLICT

A. The Ninth Circuit's Holding Does Not Conflict With the Second Circuit's Holding in *Genesee Hospital*

Lambert v. Genesee Hospital, 10 F.3d 46 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994), did not involve the filing of a written complaint with an employer, a complaint to a government agency, or the commencement of a lawsuit. The employees in *Genesee Hospital* did not even tell their employer they thought it was violating the law. Instead, the employees in that case made an oral complaint to a supervisor that a particular employee's compensation was "not fair," without so much as explaining what it was they thought was "unfair." The Second Circuit characterized this oral comment as an informal complaint and ruled that it was not protected conduct under § 215(a)(3).

Contrary to petitioners' claim, the Ninth Circuit did not "acknowledge that its decision conflicts with that of the

Second Circuit." Petition for a Writ of Certiorari at 11. The Ninth Circuit acknowledged only that the language of the Second Circuit's opinion expressed a view different from that of seven other circuits about whether "informal" complaints are protected under the FLSA. The Ninth Circuit also disagreed with the Second Circuit's reasoning that "the breadth of Title VII's anti-retaliation provision dictates the construction we should give the FLSA provision." 180 F.3d at 1005. The *holdings* of this case and the Second Circuit's decision in *Lambert v. Genesee Hospital*, however, are not in conflict.

Unlike *Genesee*, this case did not involve a mere oral complaint to supervisors that a compensation practice was "not fair" without an explicit or implicit invocation of the federal statute. In this case, the employees complained to the Department of Labor and received copies of the federal statutes and regulations from the Department of Labor. They prepared a written request for overtime supported by the statutes and regulations and presented it to the Sonics' Vice President for Finance. When the company refused to comply with the law, Laura Lambert hired legal counsel and served a state court complaint on Barry Ackerley demanding that all of the account executives be compensated in accordance with the FLSA. In contrast to *Genesee*, this case involves retaliation for an express written complaint asserting coverage and demanding payment under the FLSA, a complaint to the Department of Labor, the commencement of a formal legal proceeding by service of a complaint alleging violations of the FLSA, and a formal settlement by the employer of FLSA claims.

The Ninth Circuit has not encountered a case with facts remotely similar to those in *Lambert v. Genesee Hospital*. It remains to be seen whether the Ninth Circuit would hold an oral complaint that did not assert coverage under the statute to be protected activity. But all indications are that the Ninth Circuit would *not* disagree with the Second

Circuit's resolution of that issue. In this case, the Ninth Circuit declined to "describe the minimum specificity with which an employee must assert an alleged FLSA violation in order to find protection under § 215(a)(3)." 180 F.3d at 1008. But the Ninth Circuit *agreed* that "not all amorphous expressions of discontent constitute complaints filed within the meaning of § 215(a)(3)" – a proposition completely consistent with the holding of *Genesee Hospital*. *Id.* at 1007 (citing *Valerio v. Putnam Assoc., Inc.*, 173 F.3d 35, 44 (1st Cir. 1999)).

Thus, the Ninth Circuit's decision in this case by no means suggests that it would reach a result different from the Second Circuit's on the facts of *Genesee Hospital*. Nor do the Second Circuit's precedents clearly indicate that it would reach a result different from that of the Ninth Circuit on the facts of this case. Indeed, even while holding that the Act does not protect a generalized oral complaint of "unfairness," the *Genesee* court distinguished the Second Circuit's previous decision in *Brock v.Casey Truck Sales, Inc.*, 839 F.2d 872 (2d Cir. 1988). In that case, the Second Circuit held that employees who requested back pay compensation that the company had agreed with the Department of Labor to pay were protected from retaliation even though they had not filed a formal complaint in court or with the Department of Labor. In *Brock*, the Second Circuit observed:

> Courts have . . . not hesitated to apply the protection of section 15(a)(3) to activities less directly connected to formal proceedings where retaliatory conduct has a similar chilling effect on employees' assertion of rights.

Brock, 839 F.2d at 879. The *Genesee* court explained that, unlike the activity in *Brock* (and also unlike the actions in this case), the actions taken by the plaintiffs in *Genesee* were "neither the filing of a claim nor acts . . . that grew out of the

filing of claims. They are simply oral complaints to a supervisor." 10 F.3d at 55-56.

Thus, although the Second Circuit held in *Genesee* that generalized oral complaints are not protected conduct, it has not held that employees who file written complaints with their employer are unprotected. District courts within the Second Circuit applying *Lambert v. Genesee* have characterized the case as one involving a "verbal" or "oral" complaint to a supervisor. *See, e.g., Booze v. Shawmut Bank*, 62 F.Supp.2d 593, 598 (D. Conn. 1999). Neither the Second Circuit nor any district court within the Second Circuit has held that a written complaint expressly asserting coverage under the FLSA is not protected conduct under §215(a)(3). Nor has the Second Circuit or any other court of appeals held that contacting the Department of Labor to report a possible violation or serving a complaint in a lawsuit is not protected conduct under the statute.

Absent a ruling by the Second Circuit that a claim of retaliation is unavailable on facts comparable to those here, or a ruling by the Ninth Circuit that a nonspecific oral complaint like the one in *Genesee Hospital* would support a claim of retaliation, it is premature and speculative to suggest that there is a conflict between the Ninth and Second Circuits on an important question of law that this case should be used to resolve.[1]

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[1] To the extent that petitioners suggest that the holding of *Genesee Hospital* conflicts in principle with the holdings of the Third and Eighth Circuits that the FLSA protects employees when their employers retaliate against them in the mistaken belief that they have engaged in protected conduct (*see Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Saffels v. Rice*, 40 F.3d 1546 (8th Cir. 1994)), this case does not present any such conflict, and would not be an appropriate vehicle for attempting to resolve it. In any event, we note that the Court already declined to grant certiorari in *Genesee Hospital* itself to resolve that alleged conflict.

B. The Ninth Circuit Properly Construed Section 215(a)(3)

Section 215(a)(3) was designed to alleviate an employee's fear of retaliation for voicing a grievance. *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). To promote this purpose, every Circuit addressing the issue has held that informal complaints to and requests for information from the government constitute protected activities under § 215(a)(3). *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d at 1011 (11th Cir. 1989); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 879 (2d Cir. 1988); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975).

Petitioners' proposed narrow reading of § 215(a)(3) would "do violence to the statute's goals." *Daniel v. Winn-Dixie Atlanta, Inc.*, 611 F. Supp. 57, 59 (N.D. Ga. 1985). The court in *Daniel* explained:

> Carrying the argument to its logical extremes, an employee who consulted, but did not file a complaint with, [the Wage and Hour Division of the United States Department of Labor] and who informed her employer first would not be protected as long as the employer fired her before she actually could file a complaint. The act would protect, however, an employee who never bothered to discuss matters with an employer, but who first filed a complaint. Such a result defies common sense, and is inimical to § 215(a)(3)'s purpose.

Id.

As this Court recognized in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), "effective enforcement [of the wage provisions of the FLSA] could . . . only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Id.* at 290. *See also Drollinger v. Arizona*, 962 F.2d 956, 958 n.2 (9th Cir. 1992) ("[T]he FLSA prohibits . . . violations in *anticipation* of assertions of coverage: any other interpretation would nullify the Act's protections." (emphasis in original)).

Petitioners' proposed construction of § 215(a)(3) is contrary to the statute's plain meaning. The statute provides:

> [I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint or* instituted or caused to be *instituted any proceeding* under or related to this chapter, or has testified or is about to testify in any such proceedings, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3) (emphasis added). The phrases "filed any complaint" and "instituted any proceeding" are not defined. Because the phrases are used in the disjunctive ("or" rather than "and"), filing a complaint must be something different from instituting a proceeding. Petitioners, however, conflate the requirements by asserting that a complaint is not a complaint unless it institutes a formal judicial or administrative proceeding.

Petitioners' interpretation not only confuses two separate forms of protected conduct, but also adds a requirement not set forth in the words of the statute. According to petitioners, to be protected, an employee must

do more than "file a complaint" or "institute a proceeding." The employee must choose a court or the Department of Labor as the forum. The statute, however, does not specify a forum. It requires only that the complaint or proceeding be "under or relating to this chapter." The forum could be the Department of Labor, a court, a union grievance committee, the employer, a mediation service or other settlement forum, or any other forum that could potentially lead to resolution of the employee's concerns. [2]

Thus, under the common meaning of the statutory terms, respondents instituted proceedings by commencing a management review of the overtime issue, initiating enforcement actions by the Department of Labor, and starting a settlement negotiation. Petitioners assert that such proceedings do not qualify and that even serving a state court complaint did not "institute a proceeding." But even if the statute required a lawsuit, Washington law provides that a lawsuit in Superior Court is commenced by serving the complaint on the defendant. Wash. R. Civ. P. 3(a).

Moreover, the dictionary definition of "complaint" clearly includes an expression of dissatisfaction to an employer.[3] Arguably, as the *Genesee* court appears to have concluded, the use of the term "filed" could require that any complaint be in writing. Respondents' complaint here was in

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[2] The dictionary definition of "proceeding" is "1. PROCEDURE; 2. *pl:* EVENTS, HAPPENINGS; 3. *pl:* legal action <divorce~*s*>; 4: AFFAIR, TRANSACTION; 5: *pl:* an official record of things said or done." "Procedure" is defined as "1. a: a particular way of accomplishing something or of acting; b: a step in a procedure; 2: a. series of steps followed in a regular definite order <legal~>; 3: a. a traditional or established way of doing things; b: PROTOCOL." Webster's New Collegiate Dictionary 910 (1981).

[3] "Complaint" is defined as "1: expression of grief, pain, or resentment; 2. a: something that is the cause or subject of protest or outcry; b: a bodily ailment or disease; 3: a formal allegation against a party." Webster's New Collegiate Dictionary 228 (1981).

writing. And there is nothing in the statute that limits protection to those who file complaints in court or with the Department of Labor. On the contrary, the statute extends protection to those who file "any complaint," so long as the complaint is "under or related to" the FLSA. In *Genesee*, not only was the complaint oral, the plaintiffs simply complained that pay was unfair without invoking any statute. Thus, the complaint in *Genesee* could not fairly be characterized as "under or related" to the statute. The respondents here not only filed a written complaint of their own with their employer (in the form of their written demand for overtime), but also hired an attorney to serve a complaint in the form of a court pleading on their employer. Both complaints expressly asserted violations of the overtime laws. Section 215(a)(3) protects this conduct.

C. Petitioners' Proposed Interpretation of Section 215(a)(3) Would Amount to Judicial Repeal of the Statute

Petitioners claim that respondents' actions were not sufficiently formal to be protected against retaliation. The facts in this case make clear that the level of formality demanded by petitioners is totally unrealistic.

Respondents contacted the Department of Labor and reported petitioners' unlawful conduct. The Department of Labor provided highlighted copies of the relevant statutes to respondents and recommended that respondents discuss these materials with their employer. Petitioners suggest that respondents should have rejected the Department's recommendation and immediately insisted on a formal investigation. As a practical matter, this option did not even exist. As the Department explained in its *amicus curiae* brief to the Ninth Circuit, the Department does not and cannot launch a formal investigation in response to every employee complaint. *See* Brief for Secretary of Labor as *Amicus Curiae* at 9. Instead, the Department's enforcement

proceedings are aimed primarily at educating employers and seeking voluntary compliance with the FLSA. *Id.*

When petitioners rejected voluntary compliance efforts, respondents hired counsel and served a formal Superior Court complaint on petitioners. This resulted in negotiation of written settlement agreements before the lawsuit proceeded any further. Petitioners suggest that respondents should have refused to settle their claims at an early stage of the litigation. Otherwise, according to petitioners, respondents' employer was free to fire them for filing complaints about FLSA violations.

Petitioners' position would significantly impair the protection the law offers employees. Respondents in this case took actions clearly protected under the language of the statute. They filed a complaint with their employer. They instituted proceedings with their employer, with the Department of Labor, and in Superior Court. In all these actions, they made clear that they were claiming violations of the FLSA. If the statute protects anyone, it protects respondents.

II.

THE EVIDENCE AT TRIAL SUPPORTED THE JURY'S VERDICT THAT BARRY AND WILLIAM ACKERLEY ARE LIABLE

Petitioners argue that the lower courts erred in imposing personal liability on the Ackerleys for retaliating against them in violation of the FLSA, but they fail to identify any important legal question that merits this Court's attention. The petitioners concede, as they must, that the plain language of the statute sets forth a definition of "employer" under which individuals other than the corporation that nominally employs an employee may be liable for retaliation. The petitioners do not cite *any* decision of any court (let alone another federal court of appeals) that

has disagreed with the Ninth Circuit about the scope of the statutory definition of "employer." Nor do the petitioners cite any case holding, on similar facts, that individuals such as the Ackerleys may not be held liable under the FLSA. Thus, the petitioners' argument boils down to nothing more than a factbound claim that the evidence was insufficient to warrant the Act's application to them on these facts. This is the archetype of a claim that does not merit certiorari.

The FLSA grants an employee a private right of action against a person who has engaged in retaliation if that person is an "employer," a term that includes "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. §§ 215(a)(3), 216(b) & 203(d). The term "employer" is interpreted broadly to effectuate the FLSA's broad remedial purposes. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). In determining employer status under the FLSA, courts employ an "economic reality" test rather than common law concepts of agency. *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983) (citing *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961)); *see Bonnette*, 704 F.2d at 1469.

Thus, federal courts have uniformly held that a corporate officer with "operational control" of a corporation is an employer, along with the corporation, and is jointly and severally liable under the FLSA. *United States Dep't of Labor v. Cole Enter., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991); *Brock v. Hamad*, 867 F.2d 804, 808 n.6 (4th Cir. 1989); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984), *cert. denied*, 471 U.S. 1124 (1985); *Agnew*, 712 F.2d at 1511 (1st Cir.). The indicia of "operational control" include: significant ownership interests, control of significant functions of the business, determination of salaries, and participation in hiring decisions. *Cole Enter.*, 62 F.3d at 778. "No one factor is dispositive"; rather, the courts must assess

the "economic realities" of each case. *Elliott Travel*, 942 F.2d at 965 (quoting *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 195 (5th Cir. 1983), *cert. denied sub nom. Alberding v. Donovan*, 463 U.S. 1207 (1983)). Exclusive control over the corporation is *not* required, and the fact that other individuals handled many day-to-day functions does not preclude a finding of employer status. *Elliott Travel*, 942 F.2d at 966.

Petitioners have identified *no* appellate decisions that are in conflict with these principles. Consistent with this "overwhelming weight of authority," *Agnew*, 712 F.2d at 1511, the District Court instructed the jury:

> [Y]ou must determine whether either or both Barry Ackerley and William Ackerley are "employers." Under the [FLSA], a corporate officer or director with significant control of a subsidiary of a corporation is an employer along with the corporation. An individual need not have exclusive control over day to day functions of the subsidiary in order to be an employer under the FLSA. There may be more than one "employer" for purposes of the FLSA.
>
> Examples of the kinds of control an officer or director of a corporate employer must exercise to be an "employer" include, but are not limited to, the following: significant ownership interest with operational control of significant aspects of the corporation's day-to-day functions; the power to hire and fire employees; determination of salaries; maintaining employment records.

Instruction 19 (ER 361).

Under this standard, there was ample evidence at trial that Barry and William Ackerley were "employers" for purposes of the FLSA. There was also extensive evidence that Barry and William Ackerley personally retaliated against the plaintiffs. Petitioners' claim that "[t]here was not a shred of evidence that Barry Ackerley even knew of the plans to discharge [plaintiffs], or that William Ackerley had the slightest idea that Dresel's action was being taken to retaliate for Lambert's overtime complaint." Petition at 23. The claim is simply false. As both the district court and the Ninth Circuit confirmed, "the jury . . . heard extensive testimony that both Ackerleys were aware of and participated in the overtime dispute with the plaintiffs here, and were involved in the decision to terminate the sales staff." 180 F.3d at 1012. Indeed, to accept petitioners' claim that the Ackerleys were not involved in the decision would have required the jury to ignore an overwhelming body of evidence:

- The jury would have had to ignore that the Ackerleys' closely held corporation had a long-running policy of not paying overtime. Transcript at 666-67 (Feb. 16, 1996); Transcript at 1302-14 (Feb. 22, 1996).
- The jury would have had to ignore the numerous employee complaints and a federal court lawsuit over past overtime violations that put the Ackerleys on notice that their policy was unlawful.
- The jury would have had to ignore the fact that the letter detailing plaintiffs' overtime complaints was hand-delivered to Barry Ackerley's office. Trial Exhibit 53 (ER 117).
- The jury would have had to ignore John Dresel's testimony that he kept William Ackerley informed of day-to-day activities

and Barry Ackerley informed about important issues. Transcript at 763-64 (Feb. 16, 1996).

- The jury would have had to ignore entries in Mr. Dresel's calendar indicating that he conferred with Barry Ackerley about plaintiffs' complaints from the outset. Trial Exhibit 307 (ER 141).
- The jury would have had to ignore Mr. Dresel's note that "Barry [was] being told" of the retaliation strategy. Trial Exhibit 55 (ER 121).
- The jury would have had to ignore Mr. Dresel's admission that he attempted to alter evidence in order to conceal a calendar entry linking Barry Ackerley to the Laura Lambert strategy. Transcript at 268-69 (Feb. 20, 1996).
- The jury would have had to ignore the memorandum from Mr. Dresel informing Mr. Ackerley of the retaliatory firings. Trial Exhibit 2 (ER 113).
- The jury would have had to ignore Mr. Dresel's testimony that Eric Rubin (who was intimately involved in the unlawful plan) was so close to Mr. Ackerley that Mr. Dresel viewed telling Mr. Rubin as the equivalent of telling Mr. Ackerley. Transcript at 780 (Feb. 16, 1996).
- The jury would have had to ignore the references in Mr. Dresel's calendar to a two-hour meeting with Mr. Ackerley the day before and a follow-up telephone conversation with Mr. Ackerley on the same day that Mr. Dresel and Debbie Stednick first

discussed the plan. Trial Exhibits 54 and 307 (ER 119 and ER 141).

- The jury would have had to ignore evidence that both inside and outside public relations consultants were used to develop a plausible cover story for the retaliatory firings. Trial Exhibits 6 and 7 (SER 80 and SER 82).
- The jury would have had to ignore evidence that Barry Ackerley was personally involved in employee terminations and actively participated in other issues relating to ticket sales. Transcript at 780-82 (Feb. 16, 1996).
- The jury would have had to ignore evidence that Mr. Ackerley exerted such a high degree of control over Mr. Dresel that he had a special telephone line into Mr. Dresel's office that activated a warning light above Mr. Dresel's door (the "bat phone"). Transcript at 1292 (Feb. 22, 1996).
- The jury would have had to ignore that Mr. Dresel's calendar shows he called Mr. Ackerley on the morning of December 2, the day of the firings. Trial Exhibit 311 (ER 160).
- The list goes on.

Understandably, the jury was unable to stretch its imagination as far as petitioners would have liked. Instead, the jury drew the only reasonable inference from the evidence: that the Ackerleys not only knew of, but directed, the retaliatory firing of respondents. Even if the correctness of the jury's, the district court's, and the Ninth Circuit's assessment of the evidence were an appropriate issue for this Court, there is no reason to question their conclusion.

III.

THE EVIDENCE AT TRIAL SUPPORTED THE JURY'S AND THE DISTRICT COURT'S DETERMINATIONS THAT PLAINTIFFS AS A GROUP ENGAGED IN PROTECTED ACTIVITIES

Petitioners argue that the respondents other than Ms. Lambert were not entitled to recover because, even if Ms. Lambert's actions were protected, the other employees did not engage in protected activity. On this issue, even the dissenting judges below agreed with the majority. *See* 180 F.3d at 1016. The Ninth Circuit's unanimous determination that there was enough evidence of protected conduct by the other employees to sustain the verdict is a quintessentially fact-bound and non-certworthy issue. Petitioners, however, try to characterize it as an important legal issue by arguing that the jury instructions on this issue were erroneous and that the Ninth Circuit's implicit application of the harmless error standard to those instructions violated petitioners' Seventh Amendment right to a jury trial.

There are many reasons why this issue does not merit a grant of certiorari. *First*, the Ninth Circuit did not explicitly address either the correctness of the jury instruction or the question of harmless error, so it is impossible to say that its opinion resolves any important legal issue in a manner that either creates conflict among the federal courts or establishes a precedent that requires correction by this Court. *Second*, the petitioners' argument depends on the underlying notion that the jury instruction given at the trial was erroneous. Petitioners identify no decisions from any federal appellate court, or, indeed from any court at any level, that hold such an instruction to be erroneous. Thus, there is no basis for concluding that this underlying legal issue is sufficiently important to require this Court's attention.

Third, assuming that petitioners are correct that the Ninth Circuit implicitly found the instruction to be erroneous

and applied a harmless error analysis to it, there is no reason to believe that the standard followed by the Ninth Circuit in applying harmless error analysis to civil jury instructions merits review by this Court. Petitioners cannot assert that sustaining a verdict in a civil case in the face of an erroneous jury instruction always violates the Seventh Amendment or that an erroneous jury instruction can never be harmless error. (Indeed, even in the criminal cases on which petitioners rely, an incorrect jury instruction on an element of an offense can be harmless error. *See Neder v. United States*, 119 S. Ct. 1827 (1999).) The standard followed by the Ninth Circuit in determining whether erroneous jury instructions require reversal in a civil case is that "an error in instructing the jury in a civil case does not require reversal if the error was 'more probably than not harmless,'" such that "'the evidence would have supported a verdict for the plaintiff even with th[e requested] instruction.'" 180 F.3d at 1008 (citations omitted; brackets in original). Petitioners do not argue that this standard is erroneous, nor do they cite any conflicting authority from any court of appeals – let alone anything suggesting that the Ninth Circuit's standard violates the Seventh Amendment.

Finally, whether the Ninth Circuit properly applied the harmless error standard in this case is just another fact-specific issue with no general importance. Moreover, the Ninth Circuit's careful explanation of the evidence supporting the respondents' position that all the affected employees engaged in protected activity belies any suggestion that the court erred in assessing the facts.[4]

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[4] Petitioners falsely assert that "[t]he only one of the six respondents who actually communicated with the company regarding the subject of overtime was Lambert." Petition at 25. The testimony at trial was that each of the respondents communicated with the petitioners about overtime, not only through their spokesperson, Ms. Lambert, but also directly at sales meetings.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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